

COMPETITION AND REGULATORY NEWSLETTER

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Latest enforcement action in the CMA's crusade against pharma excessive pricing abuses

This summer has seen a spate of enforcement activity by the Competition and Markets Authority (CMA) against excessive pricing abuses by pharmaceutical firms. Most recently, the CMA provisionally (re-)found that Pfizer and Flynn Pharma engaged in excessive pricing in relation to the epilepsy medication phenytoin sodium. This follows fines in July against Auden Mckenzie and Actavis UK for the excessive pricing of drugs treating adrenal insufficiency, and Advanz for the excessive pricing of thyroid tablets.

BACKGROUND

These recent developments are the latest in the CMA's long-running crusade against excessive pricing by pharmaceutical companies.

The CMA first found that Pfizer and Flynn Pharma had engaged in excessive pricing in December 2016 (having opened its investigation in 2013). It imposed [fines](#) of £84.4 million on Pfizer and £5.2 million on Flynn Pharma, who both appealed the decision to the Competition Appeal Tribunal (CAT).

The CAT found that the CMA had incorrectly applied the legal test for unfair pricing, and remitted the case back to the CMA (further detail on the CAT's reasoning is provided in this [briefing](#)).

As expected, the CMA appealed the CAT's judgment to the Court of Appeal, which ultimately agreed with the CAT, quashing the fines and remitting the case back to the CMA (further detail on the Court of Appeal's judgment is provided in this [briefing](#)).

The Court of Appeal's judgment provided guidance on the correct methodology for assessing unfair and excessive pricing in the pharmaceutical industry - guidance which the CMA therefore had to apply both to its re-review of the Pfizer and Flynn Pharma case, and also to other excessive pricing cases which it had launched in the meantime.

These latest decisions are therefore particularly interesting - once they are publically available, they will provide the first indication of whether (and how) the CMA has taken heed of the Court of Appeal's methodology.¹

¹ The CMA has also noted it has a number of other ongoing investigations in the pharmaceuticals sector which have yet to be decided.

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CMA'S PROHIBITION DECISION AGAINST AUDEN MCKENZIE AND ACTAVIS UK

The CMA began its investigation into Auden Mckenzie and Actavis UK (now known as Accord-UK) in March 2016.

On 15 July 2021 the CMA [announced](#) its findings that the companies had charged excessively high prices for hydrocortisone tablets for almost a decade, and that it was imposing fines totalling over £260 million.

Auden Mckenzie engaged in excessive pricing from 2008-2015; in 2015 Actavis UK took over the business, and the excessive pricing continued until 2018. As a result, Accord-UK (which is also held liable for Auden Mckenzie's pre-2015 conduct) has been fined £155 million. The CMA found that Auden Mckenzie and Actavis UK increased the price of 10mg and 20mg hydrocortisone tablets by over 10,000 per cent. The CMA notes that the impact on the NHS - and ultimately the UK taxpayer - was significant, with NHS spending on the drug rising from around £500,000 a year to over £80 million a year.

The excessive pricing was possible as a result of a strategy pursued by Auden Mckenzie (and continued by Actavis UK in 2015) to pay competitors to stay out of the market. Accord-UK and Allergan (as former parent) were fined a further £66 million for this conduct. The competitors in question (Advanz and Waymade) were also fined for their part in the collusion.

CMA'S PROHIBITION DECISION AGAINST ADVANZ

The CMA launched its investigation against Advanz in October 2016. On 29 July 2021 the CMA [announced](#) that it was fining Advanz and others a total of £101.4 million for the excessive pricing of liothyronine tablets, which are used to treat thyroid hormone deficiency.

The infringement lasted from 2009 until 2017 and involved an overall price increase of over 6,000 per cent. This led to a rise in NHS spending on liothyronine tablets from £600,000 in 2006 to over £30 million by 2016. The excessive price also led to the NHS taking the decision to drop the drug in July 2015, with consequences for patients who could not afford to buy the tablets privately and may not have responded adequately to other treatments.

Advanz was fined £40.9 million, and two private equity firms which previously owned the business were fined £8.6 million and £51.9 million each.

CMA'S PROVISIONAL (RE-)FINDINGS AGAINST PFIZER AND FLYNN PHARMA

The CMA began its remittal investigation into Pfizer and Flynn Pharma on 8 June 2020, and [announced](#) on 5 August 2021 that it has once again provisionally found that they charged unfairly high prices for phenytoin sodium capsules.

The CMA's provisional findings are not publically available, so it remains to be seen how the CMA has interpreted and applied the guidance from the Court of Appeal, and whether the original fines will be reissued or adjusted.

CONCLUSION

The Chief Executive of the CMA Andrea Coscelli remarked in the Pfizer/Flynn [announcement](#) that “[p]rotecting these patients, the NHS and the taxpayers who fund it, is our priority”, and in the context of the [Advanz](#) case that the CMA's “work in the pharma sector to date, sends a clear message that breaking the law has serious consequences”. It has been a long and winding road for the CMA to get to this point - it will be hoping that, this time, it does not find itself going down the same road again.

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OTHER DEVELOPMENTS

ANTITRUST

CHINA RELEASES BLUEPRINT FOR TOUGHER ANTITRUST ENFORCEMENT AND FURTHER REGULATION OF BIG TECH

On 11 August 2021 China's State Council and the Communist Party of China's Central Committee jointly published a [five-year blueprint](#) on building a "rule-of-law" government, with strengthened antitrust enforcement one of its key priorities. It also calls for research and new legislation in tech sectors such as the digital economy, artificial intelligence, big data and cloud computing.

The blueprint follows significant recent antitrust scrutiny of Chinese tech companies including Alibaba, Tencent and Meituan and makes clear that we should expect more regulation and investigations in future. It also seeks to take measures to prevent the anti-competitive abuse of administrative power and to strengthen the fair competition review mechanism, which requires authorities in China to remove any of their policies that prevent the development of a fair market.

The document proposes that campaigns be carried out to address the issues of most public interest in different sectors, which highlights the continued importance of complaints in regulatory enforcement in China. Sanctions could also be increased significantly, with the blueprint advocating significant fines and a lifelong ban on entry to China for the most severe violations.

TRADE ASSOCIATIONS: IS YOUR MEMBERSHIP PROCESS BREACHING HONG KONG COMPETITION LAW?

On 29 July 2021 the Hong Kong Competition Commission (HKCC) published an [advisory bulletin](#) regarding potential competition law risks related to the admission criteria and procedures of trade associations and professional bodies, explaining it had previously come across issues with such rules which could have given rise to concerns under the Hong Kong Competition Ordinance. These concerns could lead to fines being imposed on both the association and its members.

The bulletin sets out the HKCC's view that membership processes are particularly important, especially as membership of a trade association may be a prerequisite to compete in a market. For this reason, the HKCC said that trade associations should ensure their admission criteria serve only to safeguard the quality and standards of their trade, meaning rules for admission should be transparent, proportionate, non-discriminatory, based on objective standards and subject to appeal in the event an application is refused.

The HKCC also set out guidance on specific situations, explaining that raising admission criteria for new members to a level existing members may not meet could be disproportionate and anti-competitive and that fees charged for an appeal should be reflective of the administration costs of the appeal process. It also said that if membership of a professional body is not compulsory, it may be anti-competitive for the professional body to approach potential clients to say they should only work with the body's members in future.

GENERAL COMPETITION

CMA CONSULTING WITH GROUPON IN RELATION TO POSSIBLE BREACHES OF CONSUMER PROTECTION LAW

An enforcement investigation launched by the CMA in April 2021 against discount voucher business Groupon UK [has found](#) that the company does not always provide customers with the form of redress to which they are legally

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entitled. In a letter addressed to the company dated 9 August 2021, the CMA noted that customers are sometimes only offered Groupon credits - instead of refunds as required under consumer laws - when they are not provided with the goods or services that they have paid for.

The CMA also expressed further concerns, including that Groupon vouchers do not always remain valid for the periods advertised, that descriptions of goods and services are occasionally inaccurate, and that Groupon does not always provide satisfactory customer service when customers raise issues.

In addition to a potential breach of consumer protection law, the CMA has said that Groupon may also be in breach of formal commitments it gave to the CMA's predecessor, the Office of Fair Trading, in March 2012. These commitments included Groupon undertaking to ensure that information on its website is not misleading, and to fully respect customers' legal cancellation and refund rights.

Groupon now has the opportunity to respond to the CMA's concerns. The CMA has noted that the company could avoid court action by agreeing to a new set of commitments, which may include compensating customers who have been denied a refund and improving compliance monitoring.

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